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No. 95-1175

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOSE R. BRAVO, *et al.*,
Petitioners,
v.

NATIONAL MEDIATION BOARD and
AIR LINE PILOTS ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
1. The NMB Balloting Process And The Contested Rerun Election	1
2. The Proceedings Below	2
REASONS WHY THE PETITION SHOULD BE DENIED	4
I. THE RULINGS BELOW ARE CONSISTENT WITH THE SETTLED LAW OF THIS COURT UPHOLDING THE CHALLENGED BALLOTING PROCEDURES	4
II. THE PETITION RAISES NO ISSUE OF CONSTITUTIONAL DIMENSION	5
CONCLUSION	8

TABLE OF AUTHORITIES

CASES: Page

A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) 7

Bhd. of Ry. & S.S. Clerks v. Ass'n for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965) ..... *passim*

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 7

Ellis v. BRAC, 466 U.S. 435 (1984) 5

Knight v. Minnesota Community College Faculty Ass'n, 571 F. Supp. 1 (D. Minn. 1982) (three judge panel), *aff'd*, 460 U.S. 1048 (1983), *rev'd in part on other grounds*, 465 U.S. 271 (1984) 7

Leedom v. Kyne, 358 U.S. 184 (1958) 4

Machinists v. Street, 367 U.S. 740 (1961) 5

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 7

Railway Employes' Department v. Hanson, 351 U.S. 225 (1956) 5, 7

Switchmen's Union of North America v. NMB, 320 U.S. 297 (1943) 4

Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937) 7

STATUTES:

Railway Labor Act,

§ 2 Fourth, 45 U.S.C. § 152, Fourth 4

§ 2 Ninth, 45 U.S.C. § 152, Ninth 4

§ 2 Eleventh, 45 U.S.C. § 152, Eleventh 5

MISCELLANEOUS:

1 Hardin, Developing Labor Law (3d ed. 1992) 7

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION

Respondent Air Line Pilots Association ("ALPA") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the District of Columbia Circuit in this case.

STATEMENT OF FACTS

1. *The NMB Balloting Process And The Contested Rerun Election*

This case arises out of petitioners' challenge to the National Mediation Board's ("NMB" or "Board") June 14, 1993 certification of ALPA as the exclusive representative of pilots employed by Federal Express Corporation ("FedEx"). A. 30a-79a.[1] Petitioners are supporters

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[1] Record citations are to materials reprinted in the Appendix ("A.").

of the Federal Express Pilots For A Non-Union Operation, Inc. ("FEPNO"). The challenged certification is the result of a rerun election ordered by the NMB after it upheld ALPA's objections to an earlier election in August, 1991. A. 90a-134a, 150a.

The NMB mailed its standard ballots on December 3, 1992 and tabulated the results on January 14, 1993, using the decades-old standard NMB balloting procedure. Under this procedure, if a majority of eligible voters cast valid ballots for union representation, the union that receives the majority of valid ballots is certified. Those failing to return ballots are presumed to vote against any representation, and if less than a majority casts ballots, the NMB certifies no representative. A. 149a at ¶ 18; A. 82a n.1, 88a n.1.[2]

Under the NMB standard balloting rules, ALPA was certified as the representative because a majority of eligible voters cast ballots for union representation and ALPA received the majority of those votes.

2. *The Proceedings Below*

On October 15, 1993, FEPNO filed the Complaint in this action (A. 144a-166a) to set aside the Board's certification of ALPA. Petitioners assert that (1) the NMB had violated the right of FedEx pilots to be governed by the decision of the "majority of any craft or class of employees" under Railway Labor Act ("RLA") Section 2 Fourth, 45 U.S.C. § 152, Fourth, because ALPA was certified based on the votes of the majority of employees who voted for representation, rather than the votes of an absolute majority of all eligible voters, and (2) this certification violated the First and Fifth Amendment rights of FedEx pilots who opposed ALPA representation.

In support of both of these claims, FEPNO relied exclusively upon opinion testimony in the form of an

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[2] Petitioners refer to this standard NMB balloting procedure as the "majority-of-the-majority" rule.

affidavit (A. 168a-194a) from William Mark Crain, a political scientist, who criticized the Board's balloting procedures, arguing that they lead to "strategic voting" and "perverse" outcomes when there are more than two ballot choices, resulting in a "bias" in favor of union certification. A. 180a-183a at ¶¶ 15-25(b). Crain asserted that other balloting procedures would better gauge the "true preferences" of voters in multi-union elections. *See, e.g.*, A. 178a-179a at ¶¶ 11-14, 189a-190a at ¶ 40.

After ALPA's unopposed motion to intervene was granted, both ALPA and the NMB moved to dismiss or in the alternative for summary judgment. FEPNO filed a cross-motion for summary judgment.

By Memorandum Order dated October 21, 1994 (A. 4a-22a), the district court granted defendants' motion to dismiss, concluding that controlling precedent precluded FEPNO's statutory and constitutional attacks, noting that over thirty years ago this Court had, in reviewing the NMB's standard ballot and balloting procedure, concluded that: "the selection of a ballot is a necessary incident of the Board's duty to resolve disputes. The Act expressly says as much, instructing the Board alone to establish the rules governing elections. Thus, it is clear that its decision on the matter is not subject to review where there is no showing that it has acted in excess of its statutory duty." A. 15a, quoting *Bhd. of Ry. & S.S. Clerks v. Ass'n for the Benefit of Non-Contract Employees* ("*BRAC*"), 380 U.S. 650, 669 (1965). The district court further concluded that FEPNO's constitutional claims were "without merit," since the courts have repeatedly cast aside similar challenges to the Board's long-established balloting processes. A. 20a-22a.

On October 25, 1995, in a memorandum judgment (A. 1a-3a), the District of Columbia Circuit concluded that petitioners' arguments "do not require an opinion" and "affirmed in full" the district court's decision, concluding that "[o]ne sparse study offered by petitioners

does not approach th[e] threshold" of demonstrating either a gross statutory violation or an error of "constitutional dimension," as is necessary to disturb the Board's exclusive jurisdiction. A. 2a.

REASONS WHY THE PETITION SHOULD BE DENIED

Over fifty years ago, in *Switchmen's Union of North America v. NMB*, 320 U.S. 297 (1943), this Court ruled that NMB certifications are unreviewable. The Court held that Congress intended a representational dispute "to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." *Id.* at 304-05. More than thirty years ago, the Court confirmed that this jurisdictional limitation applies to the Board's selection of balloting procedures, and expressly approved the standard balloting procedure challenged here. *BRAC*, 380 U.S. 650 (1965). These authorities have been uniformly followed, as they were by the courts below; petitioners offer no basis for reconsideration or reversal of these settled holdings.

I. THE RULINGS BELOW ARE CONSISTENT WITH THE SETTLED LAW OF THIS COURT UPHOLDING THE CHALLENGED BALLOTING PROCEDURES.

Board certification decisions are subject to review *only* if the Board's determination is "made in excess of its delegated powers and contrary to a *specific prohibition in the Act*." *BRAC*, 380 U.S. at 660 (quoting *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)) (emphasis in original). As the lower courts in this case determined, petitioners can make no such showing, as the statute leaves it entirely up to the Board under Sections 2, Fourth and Ninth to determine what constitutes a "majority." *See id.* at 659. Similarly, the selection of balloting procedures and the other rules governing elections are "left for the final determination of the Board" alone. *Id.* at 669. Indeed,

> [*N*]*ot only does the statute fail to spell out the form of any ballot that might be used but it does not even require selection by ballot.* It leaves the details to the broad discretion of the Board with only the *caveat* that it 'insure' freedom from carrier interference.

Id. at 668-69 (emphasis added).

Thus, the lower courts here properly concluded that petitioners' criticisms are merely arguments "in terms of policy and broad generalities as to what the Railway Labor Act should provide," which are insufficient to disturb the Board's discretion.

> The very nature of these arguments indicates that the Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board. These are matters for Congress and the Board rather than the courts.

BRAC, 380 U.S. at 671.

II. THE PETITION RAISES NO ISSUE OF CONSTITUTIONAL DIMENSION.

Petitioners attempt to manufacture a basis for review by asserting (at 12-21) that their constitutional rights are violated because the Board's balloting process may, in a multi-union election, operate to certify a union which does not obtain absolute majority support. However, as petitioners concede (at 13-14), opponents of union representation have no constitutional right to refuse exclusive representation, or even compulsory association with or financial support of unions pursuant to a "union shop" or "agency shop" agreement authorized by RLA Section 2 Eleventh, 45 U.S.C. § 152, Eleventh. *See, e.g., Railway Employes' Department v. Hanson*, 351 U.S. 225, 233-38 (1956); *Machinists v. Street*, 367 U.S. 740, 759-69 (1961); *Ellis v. BRAC*, 466 U.S. 435, 444-48, 455-56 (1984).

Petitioners assert (at 14-21), relying solely upon Mr. Crain's affidavit, that the NMB's ballot procedure nonetheless violates the First Amendment because it (a) is not the method "least restrictive" of the employees' associational rights because it fails to "identify the majority's *true* choice in a close three-way election" and (b) creates an unconstitutional "irrebuttable presumption" in favor of representation by "discriminator[ily]" totaling the votes cast for each representative rather than requiring an outright and absolute majority.

The lower courts properly dismissed these contentions out of hand. This Court has recognized that the overriding "presumption" at work in the Board's balloting process is one *against* representation because "[a]ll [an employee] need do is not vote and this is considered a vote against" any representation and the "practicalities of voting—the fact that many who favor some representation will not vote—are in favor of the employee who wants 'no union.'" *BRAC*, 380 U.S. at 669 n.5.[3] Moreover, as the district court noted (A. 20a), the premise underlying petitioners' claims is false—there simply is no constitutional right to an absolute majority vote in a representation election (or even a Presidential or other political election). Finally, contrary to petitioners' demands for a "less restrictive" procedure, it is settled that the Board is not required to use *any* ballot, *BRAC*, 380 U.S. at 668, much less the one petitioners prefer. Indeed, the Board may, consistent with the Con-

[3] Indeed, the NMB's standard balloting procedure is the most *hostile* to union organizing of any used in labor elections, because its rule, unlike that of the National Labor Relations Board ("NLRB"), imposes a threshold requirement that an outright majority vote in favor of representation, with *all* non-voters presumed to oppose *any* union. The NLRB's procedure presumes that those who do not vote acquiesce in the voting majority's will, and the NLRB will therefore certify an organization that receives a majority of the votes actually cast, even if *less* than a majority cast ballots for representation. *See BRAC*, 380 U.S. at 670-71.

stitution, use ballot presumptions that assume that non-voters " 'assent to the expressed will of the majority of those voting.' " *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 560 (1937) (citation omitted). Therefore, the constitutionality of the Board's procedure, which requires opponents of representation to do *nothing* to "vote" against *all* unions, cannot be seriously questioned.[4]

In sum, the courts below correctly determined that petitioners' disagreements with the Board cannot create a constitutional violation. Their critiques are simply policy arguments for an election procedure more to their liking, which are "matters for Congress and the Board rather than the courts." *BRAC*, 380 U.S. at 671.

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[4] Petitioners' equally baseless due process claim, which relies upon (at 21-23) *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935), merited no comment from the courts below. These cases, which are based upon long-rejected notions that Congressional authority is non-delegable and subject to "substantive due process," shed no light on the constitutionality of exclusive representation and are therefore irrelevant to petitioners' argument. Indeed, *Carter* predates *Hanson*, and even *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which expressly declined to follow *Carter*, 301 U.S. at 41, and broadly concluded that the Wagner Act (creating the NLRB and adding to the federal regime of collective bargaining and exclusive representation) was a constitutional exercise of Congressional auhtority under the Commerce Clause. *See* 1 Hardin, *The Developing Labor Law* at 30-31 (3d ed. 1992). Petitioners' counsel was taken to task for pursuing this "frivolous" argument over a decade ago in *Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1 at 4, 15-16 (D. Minn. 1982) (three judge panel), *aff'd*, 460 U.S. 1048 (1983), *rev'd in part on other grounds*, 465 U.S. 271, 279, 291 (1984) (confirming that Court's summary affirmance rejected this claim).

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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